UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, D.C. 20001

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DATE: December 2, 1997

CASE NO.: **96 INA 167**

In the Matter of:

SAN LUIS ARCO,
Employer

on behalf of

ELMER HERNANDEZ,
Alien

Appearance: D. E. Korenberg, Esq., of Encino, California.

Before : Huddleston, Larson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ELMER HERNANDEZ (Alien) by SAN LUIS ARCO (Employer) under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On March 13, 1994, the Employer, San Lis Arco, applied for alien labor certification on behalf of the Alien, Elmer Hernandez, to fill the position of "Mechanic Shop Manager." AF 30-31, 76-78. Employer required a high school education and three years of experience on the job offered or in the Related Occupation of "Mechanic." The Other Special Reuirements were tht the applicant's experience must include the use of Allen Smart Analyzer, gas pump repair, and brake lathe machine.[3] The job duties were described as follows:

> Supervise mechanics engaged in diagnose, repair and maintenance of gas and diesel fueled automobile engines and transmissions. Prepare work schedules and assign workers to specific duties, such as mechanical/electrical repairs and customer service. Responsible for cash reconciliation and bank deposits. Direct and participates in performing service activities; diagnosis of problems using computerized equipment such us Allen Smart Analyzer, brake lathe machine and high speed tire balance. Ensure proper maintenance of machinery and equipment including pump repair. Oversee mechanics in performing smog inspections and repairs as needed. Enforces security measures.

(Original is quoted without correction.)AF 30.[4] Two U. S.

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[2]Administrative notice is taken of the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The job was to be forty hours a week at $12.00 an hour, with time and a half for overtime. The hours were to be from 12:00 Noon to 9:00 PM.

[4]The Alien worked for Employer from May 1990 to the date he signed the application, February 7, 1994. His duties included several of those in the Job to be Performed, as stated at AF 30, Item 13, in Employer's application. AF 77. He claims no other qualifying experience.

workers responded to the offer of this position, one of whom was rejected as unqualified and the other was offered the position but rejected it. AF 38-39, 43, 45-46, 48-51, 54-56.

Notice of Findings. In the May 10, 1995, Notice of Findings (NOF), the CO advised that certification would be denied subject to rebuttal for two reasons. (1) Employer failed to show that its job requirements represented its actual minimum requirements for the position under 20 CFR § 656.21(b)(5). The reason was that, although Employer required that "experience must include the use of Allen Smart Analyzer, gas pump repair, and brake lathe machine," the evidence did not establish that the Alien had that experience at the time he was hired. Instead, the CO found that the Employer trained the Alien or provided him with the necessary learning opportunities while he was working in its garage. (2) The Employer delayed contacting one or more of the referred applicants, failed to interview one worker, and rejected at least one qualified U. S. worker for reasons that were neither valid nor job-related. AF 23-27.

Rebuttal. The Employer's June 12, 1995, rebuttal addressed the issues stated in the NOF. AF 09-22. Among other statements, the Employer asserted that, "The position is a promoted one--from mechanic to supervisor," contending that the job involves supervisory duties rather than the duties of a general mechanic and citing **Paradise Produce, Inc.**, 90 INA 463 (Apr. 6, 1992), and **Delitizer Corporation of Newton**, 88 INA 482 (May 9, 1990)(en banc). AF 10. The Employer emphasized that the position was newly created, as it intended to reassign its existing supervisor to work in another garage businesses that it owns. The Employer then offered evidence of its efforts to contact Mr. Gray and Mr. Taylor by telephone and certified mail. It stated its reasons for rejecting Mr. Gray and argued that its attempt to contact Mr. Taylor occurred in materially less time than the CO found in the NOF. AF 11-12. The Employer included a verified statement by its current garage supervisor, who elaborated on the work he performs in the position at issue and discussed his rejection of Mr. Gray as a candidate for the job. He verified that the reason for rejecting this U. S.worker was that the applicant did not know how to use either the Allen Smart Analyzer or the brake lathe machine. AF 14.

Final Determination. On July 22, 1995, the CO's Final Determination denied certification because (1) the Employer had failed to state its minimum requirements for the job and (2) the Employer failed to demonstrate that it had engaged in a good faith effort to recruit for the position offered.

(1) The CO rejected the rebuttal arguments based on the holding in **Delitizer**, as the Employer admitted that the Alien learned all of the skills described in the Special Requirements

while he was working for the Employer as a mechanic. The CO found that the Employer failed to establish that it had hired the Alien to work in a distinctly different occupation from the job at issue. The CO explained that the Employer conceded (1) that it expected the Manager to have had three years of experience in the position that he now will supervise and (2) that the only way to qualify as a Mechanic Shop Manager in this garage was to have been a Mechanic who had used the garage equipment named in its application. The CO then added,

> Although your rebuttal says that you would accept an applicant who had **knowledge** of your equipment, rather than **experience**, you did not amend the ETA 750A to reflect that difference. It is not clear, however, what effect that would have since it is evident the specific brands of equipment you require so narrow the job opportunity you cannot now show this opportunity is "clearly open to any qualified U. S. applicant" as requlation 20 CFR 656.20(c)(8) requires.

AF 07. (Emphasis as in the original.)

(2) The CO also observed (a) that Employer claimed Mr. Gray showed no knowledge of the equipment named in its application and that it could not train him, and (b) that it did not attempt to reach Mr. Taylor until at least ten days after it received his resume. The CO rejected Employer's allegations as to Mr. Gray, who had fourteen years of experience as a garage supervisor and to whom it readily could have given the requisite training in the garage equipment it described. Observing that Mr. Taylor was highly qualified, the CO rejected the Employer's excuses for its delay in calling him. Id.

Appeal. The Employer offered a motion for reconsideration in the form of an argument responding to the Final Determination. As the Employer failed to state any arguments that it could not have set out in its timely rebuttal, the CO referred this matter as an appeal to the Office of Administrative Law Judges, as requested by the Employer, and the Employer's letter of August 15, 1995, has been considered as its brief on appeal. AF 05.

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, when an employer seeks to require for restrictive qualifications of U. S. job seekers in testing the labor market when it seeks immigration certification to hire an alien for the job at issue its use of restrictive job criteria is limited by 20 CFR § 656.21(b)(5). An employer is required by 20 CFR § 656.21 (b)(5), to establish that its hiring qualifications for the position offered are its actual minimum requirements for the job, that it has not in the past hired

workers with less training or experience to perform work similar to duties of the position at issue, and that it is not feasible to hire workers with less training or experience than is normally required by the job it now seeks to fill.

20 CFR § 656.21(b)(5) is addressed to the provision that the job qualifications an employer may require of U. S. workers shall not be greater than it demands of the alien. It was established in **Jackson and Hull Engineers**, 87 INA 547 (Nov. 24, 1987)(en banc), that under 20 CFR § 656.21(b)(6) an employer must prove that it has not hired workers with less training or experience for the job at issue or for similar positions. This Employer challenges the CO's conclusion that it did not demonstrate that Alien's experience when he was initially hired was equal to the experience that it required of the U. S. applicants for this job.[5]

As the Employer did not deny that the Alien's experience in the use of the Allen Smart Analyzer, in gas pump repair, and on the brake lathe machine was acquired while in its employ, this preliminary finding by the CO is affirmed as based on sufficient evidence. Since Employer further admitted that, "The position is a promoted one--from mechanic to supervisor," we also affirm the CO's subordinate findings that (1) the applicant for Mechanic Shop Manager was required to offer three years of experience as a Mechanic, and that (2) the only way to qualify as a Mechanic Shop Manager in this Employer's garage was to be a Garage Mechanic who had used the equipment and other processes Employer specified as special requirements. AF 07, 10.

While Employer relies on its construction of **Delitizer**, supra, the CO distinguished this case from the facts the Board considered, as Employer failed to prove that the job for which this Alien was first hired was distinctly different from the position at issue. Tailoring its argument to **Delitizer**, Employer said, "[While] Mr. Hernandez did gain the equipment knowledge while working as a mechanic ... he did <u>not</u> gain the experience as a supervisor." AF 02. (Emphasis as in original.) Consequently, the Employer contends that 20 CFR § 656.21(b)(5) allows it to include these specific elements of experience as part of its actual minimum requirement for the position since, even though the Alien acquired the requisite experience while working as a Mechanic in its garage, his job duties as a Mechanic Shop Manager would be materially different because he would now be supervising other workers engaged in many of the same job duties he performed

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[5]BALCA has observed in this regard that an employer is not allowed to treat the alien more favorably than it treats a U. S. worker applying for the position. **ERF Inc., d/b/a Bayside Motor Inn,** 89 INA 105 (Feb. 14, 1990). (Although the panel in **ERF, Inc.,** referred to 20 CFR § 656.21(b)(6), this subsection became § 656.21 (b)(5) on recodification.)

as Mechanic. Moreover, if such supervisory experience is the issue and not the working knowledge of this equipment, as this assertion suggests, the Employer's argument clearly lacks merit since Mr. Gray's most recent experience was as manager of a car rental fleet, and his expertise was credibly certified after he received training in seven specific areas of automotive repair that encompassed the work of its garage. AF 46.[6]

It is further persuasive that tThe CO gave decisive weight to the Employer's admission that the only way to become its Mechanic Shop Manager was by progressing to that position from an entry level job as a Mechanic through performing duties that included the use of specific items of garage equipment named in its application. AF 07, 10. in view of Employer's representation that "the position is a promoted one--from mechanic to supervisor," the CO rationally inferred that in this Employer's garage the positions of "Mechanic" and "Mechanic Shop Manager" are in fact a single job through which a worker is expected to pass with rising levels of responsibililty from an entry to a supervisory level. AF 10. It follows that the qualifications for Mechanic Shop Manager are controlled by the entry level skills Employer required when it hired the Alien as a Mechanic, subject to a showing of suitable work experience. Consequently, **Delitizer** did not apply in this case, since the Employer's restrictive job requirements limited competition for the position to workers whose experience was gained by using the specified equipment in the Employer's own garage, a criterion that is in consistent with 20 CFR §§ 656.21(b)(2)(i)(A) and (B).

The Employer's experience requirement violates the Act, as it is perceived to have restrained U. S. candidates other than Alien from applying for this job. Since § 656.21(b)(5) requires an employer to show that the qualifications in its application represent its actual minimum requirements for the job, we affirm the CO's finding that this Employer failed to establish that it is not feasible to hire a U. S. worker without the restrictively required job experience because the CO's conclusion was based on sufficient evidence. **Jackson and Hull Engineers**, 87 INA 547 (Nov. 24, 1987)(en banc).

(2) The CO's finding that the Employer's recruitment effort was insufficient under the Act and regulations is grounded on the Employer's treatment of the qualified U. S. workers who applied

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[6]The Board explained in **Delitizer**, however, that the burden of an employer is to prove the "dissimilarity" of the position offered from the job in which the alien gained the restrictive experience but, it added, while a comparison of the job duties is relevant, such a distinction is not the sole consideration. This is irrelevant, however, since the evidence of record supports the CO's finding that Mr. Gray was well qualified for the job. BALCA concluded, moreover, that § 656.21(b)(5) gives the CO "broad discretion" to determine the similarity or dissimilarity of the two positions at issue.

for this position. In particular, the Employer failed to explain with persuasive evidence that it was not feasible to train Mr. Gray to teach, to perform and to supervise the work of Mechanics with the Allen Smart Analyzer and the brake lathe machine, and to perform the requisite gas pump repairs. In the absence of proof by the Employer to the contrary and in view of its admissions against interest, it is found that the Alien was trained to do the requisite work while he was employed by the Employer, and that it was normal for the Employer to provide such training to all of its Mechanics within the meaning of 20 CFR § 656.21(g)(7). Moreover, Employer's failure to offer Mr. Gray the same training as it provided to the Alien is clearly inconsistent with 20 CFR § 656.21(g)(8). Also, when Mr. Gray's resume is considered, it is consistent with 20 CFR § 656.21(b)(2)(i) to find that the CO had sufficient evidence to conclude that he was well qualified for the job. Consequently, it follows that the CO correctly found that the Employer rejected Mr. Gray for reasons that were neither lawful nor job-related.

Accordingly, it is found that the CO correctly denied certification, and the following order will enter.[7]

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

[7]While other issues were preserved by the CO, the findings dicussed above are sufficient to support the conclusion that the application for certification should be denied.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.